FILED

Supreme Court

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No. 7[illegible]

JOHNSON & RIGGINS OF CALIFORNIA,

Petitioner,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

CLETUS KEATING,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

No. 166.

JOHNSON & HIGGINS OF CALIFORNIA,
Petitioner,
against
THE UNITED STATES.

BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioner seeks a review of the judgment of the Court of Claims (fol. 18) in favor of the defendant dismissing the petition.

The facts are outlined in the petition for writ of certiorari (fol. 2 to fol. 5).

FIRST POINT.

THE DECISION OF THE COURT OF CLAIMS THAT THE OBLIGATION TO CONTRIBUTE IN GENERAL AVERAGE MUST ARISE OUT OF A SPECIAL CONTRACT BETWEEN THE SHIPOWNER AND THE CARGO OWNER IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND ALL AUTHORITIES IN ENGLAND.

A: *The nature of general average contribution.*

This Court concisely defined general average in the *Star of Hope*, 9 Wall. 203 (at page 228) as follows:

> "General average contribution is defined to be a contribution by all the parties in a sea adventure

to make good the loss sustained by one of their number on account of sacrifies voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. * * *

"Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

"Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, * * *."

* * * * * *

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interest shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice."

In the case of *Ralli* v. *Troop,* 157 U. S. 386 (at page 411), this Court said:

"In this country when a ship is on fire, damage caused to goods in the hold by water either poured down from above or let in by scuttling the ship by the master or under his order or direction for the

> purpose of saving ship and cargo has long been considered a subject of general average."

This is precisely the situation presented in the case at bar in which a portion of the cargo was damaged by water with which the fire on the LOGAN was extinguished under the direction of the master, thus saving the ship and the balance of the cargo.

The Court of Claims, however, taking up a point that was not considered by either the petitioner or the respondent in their respective briefs, held that no general average situation was presented in this case because of the fact that no freight was paid for the carriage of the cargo in question. This decision of the Court of Claims is based upon a complete misconception of the nature of general average, and conflicts with all the authorities on this subject.

B: *The decision of the Court of Claims is in conflict with the decisions of this Court.*

The Court of Claims held that the United States was not liable to contribute in general average because there was no contract for payment of freight between it as owner of the LOGAN and the cargo owners and, therefore, that the United States had no interest in the preparation of a general average statement and was not obligated to pay for one. This is in conflict with decisions of this Court which have reiterated time and again that the liability of a shipowner or cargo owner to contribute in general average arises not from any express contract, but out of the general maritime law and is based on equity.

In *Charter Shipping Company* v. *Bowring*, 281 U. S. 515, 517, Mr. Justice Stone, referring to liability to contribute in general average, said:

> "*As that liability arises not from contract* but from participation in the common venture its extent in the absence of such limiting clauses is under the admiralty rule fixed by the law of the port of destination." (Italics ours.)

In the leading case of *Ralli* v. *Troop*, 157 U. S. 386, at 397 this Court said:

> "As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure but rather on the established law of the sea in the light of a special duty which all owners of ships and cargoes undertake in maritime adventures * * *"

and again at page 418:

> "The law of general average is part of the maritime law and not of the municipal law and applies to maritime adventures only."

In the same opinion at page 396, quoting from the case of *Burton* v. *English*, 12 Q. B. D. 218:

> " 'By what law does the right arise to general average contribution? I do not think that it forms any part of the contract to carry; and that it does not arise from any contract at all but from the old Rhodian laws and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract but in consequence of a common danger where natural justice required that all should contribute to indemnify for the loss

> of property which is sacrificed by one in order that the whole adventure may be saved.' "

In *The Eagle*, 8 Wall. 15, this court was discussing an objection to jurisdiction on the ground that the case was not brought within the requirements of the Act of 1845. In this connection it was said at page 23 of the opinion:

> "We think it also a matter of grave doubt if the Act confers jurisdiction in cases of salvage, jettison or general average. These are not matters of contract according to the most eminent commentators on the subject and they certainly are not cases of tort."

See also *Hobson* v. *Lord*, 92 U. S. 397; *Barnard* v. *Adams*, 10 How. 270, 303.

It is clear that the decision of the Court of Claims holding that there was no obligation to contribute in general average in the case at bar because of the absence of an express contract for payment of freight between the owner of the LOGAN and the cargo owners completely disregards the decisions of this Court on the subject.

C: *The decision of the Court of Claims is in conflict with all English authorities.*

The English Courts and text writers uniformly state that general average arises from the general maritime law and is not dependent on any contract.

In *Carver on the Carriage of Goods by Sea*, 7th Ed., page 513, it is said:

> "Brett, L. J. in *Burton* v. *English*, said: '*I do not think that it (the right to contribute) forms*

> ***any part of the contract to carry and that it does not arise from any contract at all*** but from old Rhodian laws and has become incorporated into the law of England as the law of the ocean. ***It is not as a matter of contract but in consequence of a common danger*** where naturally justice requires that all should contribute to indemnify the loss of property which is sacrificed by one in order that the whole adventure may be saved.'" (Italics ours.)

Similarly in *Lowndes' General Average*, 6th Ed. page 32, the following statement appears:

> "*The liability to contribute in no sense results from the contract of carriage but exists wholly independently of the contract* of carriage by virtue of the equitable doctrine of the Rhodian law which as part of the law maritime has been incorporated in the municipal law of England." (Italics ours.)

Duckworth on Marine Law, 3rd Ed. states as follows at page 186:

> "It was once suggested that liability to pay a general average contribution was based upon an implied contract; but it is now generally accepted that it is an integral part of maritime law and so became incorporated in the law of this country. It is to be borne in mind that the right to claim average contribution is a purely maritime law and that nothing in any way resembling it is sanctioned by authority in relation to land contracts or to circumstances happening on land."

Arnould on Marine Insurance and General Average (11th Ed.) Vol. II, in note (g) to Section 908, says:

> "The view best supported by judicial authority in this country is that the right arises not out of contract but from the old Rhodian laws and has thence become incorporated into the laws of England as the law of the ocean."

In *Milburn* v. *Jamaica Fruit etc. Co.* (1900) 2 Q. B. 540, Vaughan Williams, L. J., said at page 550:

> "The liability to contribute in no sense results from the contract of carriage but exists wholly by virtue of the equitable doctrine of the Rhodian law which as part of the law maritime has been incorporated in the municipal law of England."

The Court of Claims has based its decision that no general average situation was involved in this case on the assumption that as no freight was paid by the owners of the cargo, no duty was owed the cargo by the vessel. The fallacy of this position is apparent. It is directly contrary to the fundamental concept of general average. *The various cargo owners owe one another no duty whatsoever, contractual or otherwise, yet they are obliged to contribute to one another in general average under the maritime law in the event of a sacrifice by one of them for the common benefit of ship and cargo.* Carver, Carriage of Goods by Sea (7th Ed.), Sec. 364.

As the authorities cited above definitely state, the obligation to contribute and the right to receive contribution in general average arises not from a special contract but is apart from contract and arises out of maritime law. Equity imposes the duty to contribute in general average as a result of mutual participation in the same sea risk.

SECOND POINT.

A FUNDAMENTAL POINT OF MARITIME LAW IS PRESENTED WHICH IS OF GREAT IMPORTANCE TO COMMERCIAL AND SHIPPING INTERESTS AND TO THE GOVERNMENT AS WELL.

Situations involving the principal in this case are constantly arising. If the principle announced by the Court of Claims, which is in direct conflict with the established commercial law, be allowed to remain on the books, serious confusion in shipping practice will inevitably result.

Frequently ship and cargo are under common ownership. In such cases, as in the present case, no freight is paid and no contract involved, yet it has always been held that the maritime law of general average applies.

In the recent case of *Gulf Refining Company* v. *Universal Ins. Co.*, 32 Fed. (2nd) 555 (1929) the Circuit Court of Appeals for the Second Circuit said on this subject:

> "It is authoritatively settled that general average depends upon the event of a common sacrifice for the benefit of all who are or may be interested in the voyage—not upon the existence of different contributory subjects. Contribution is a consequence. Neither the absence of a cargo nor the common ownership of vessel and cargo will affect the application of the principle of general average. *Potter* v. *Ocean Ins. Company,* Fed. Cas. No. 11,335; *La Fonciere Co.* v. *Dollar,* 181 Fed. 945; *Risley* v. *Ins. Co. of North America,* 189 Fed. 529."

The same rule applies in England. See *Montgomery & Company* v. *Indemnity Mutual Marine Ins. Company, Ltd.* (1902) 1 K. B. 734, where it was held that even though ship and cargo both belonged to the same owner

(no freight being paid), the law of contribution in general average still applies.

The practical aspect of this situation arises where different underwriters have insured ship and cargo where both have the same owner, or in cases similar to the one at bar. In such cases it has never before been held that the underwriters were not entitled to receive general average contribution or were not obliged to contribute in general average as if the ownership were separate and distinct, and freight duly paid. See *Potter* v. *Ocean Ins. Company,* Fed. Cas. No. 11,335; *Montgomery & Company* v. *Indemnity Mutual Marine Ins. Company, Ltd.* (1902), 1 K. B. 734.

For example, in the case at bar a part of the cargo of the LOGAN was insured by the Atlantic Mutual Insurance Company. This underwriter now has an action pending in the United States Court of Claims to recover a general average contribution from the Government as owner of the LOGAN.

In the case at bar a portion of the cargo was sacrificed and resulted in saving the common adventure. For this reason the decision of the Court of Claims holding that no general average situation exists operates in favor of the Government which would otherwise be obligated to contribute in general average for the benefit of the cargo that was sacrificed. A contrary situation, however, is just as apt to arise, where the sacrifice is made by the Government vessel. In such a case the rule announced by the Court below in this case would prevent the Government from recovering from the cargo any general average contribution. It is obvious that no such exception to the uniform rule should be created, at least without the sanction of this Court.

THIRD POINT.

THE DECISION OF THE COURT OF CLAIMS THAT THE GOVERNMENT WAS NOT OBLIGATED TO PAY TO THE PETITIONER THE FAIR VALUE OF THE ADJUSTMENT OF GENERAL AVERAGE RECEIVED BY IT FROM THE PETITIONER IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

In the case at bar the United States, as owner of the LOGAN, was obligated to have prepared a general average statement. The duty of a vessel owner to so do was stated by this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386. In that case the Court said at page 400:

> "After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship, or in his absence the master as his agent, has the duty of having an adjustment made of the general average, * * *."

Because of the intricate problems involved in the determination of general average contribution in modern voyages in which so many varied cargo interests are concerned, the custom has grown up of engaging professional average adjusters who are familiar with the difficult problems of accounting concerned in these cases. This custom is recognized by the Courts. *Amelia S. de Perez*, 22 F. (2nd) 585. In this case the Court said:

> "From the very origin of general average it appears to have been the duty of the master as representative of the shipowners to make general average adjustment * * *. The custom has, to be sure, grown up of engaging adjusters for con-

> venience sake, who can familiarize themselves with and work out the rather difficult problems of accounting that are involved in many of these cases."

The Acting Judge Advocate General of the United States Army, recognizing that the United States as owner of the LOGAN was under obligation to have an adjustment of general average prepared, recommended to the Quartermaster General of the United States that the matter be referred to a professional general average adjuster in accordance with the recognized custom (fol. 11). Accordingly the administrative officer of the United States Army Transport Service requested the plaintiff to prepare such a general average statement. Whether or not the record in this case shows that this officer had authority to order such a statement, it is clear under the decisions of this Court that the petitioner is entitled to recover the fair value of its services in preparing the adjustment of general average for the Government.

It has been held by this court that although a contract under which services were rendered to the United States may be void, one who renders those services may be entitled to recover their fair value.

In the case of *Clark* v. *United States,* 95 U. S. 539, 543, where the Government used a vessel of the claimant under a contract that was void by reason of not being in accordance with the controlling statute, this court held that the claimant was entitled to the value of the use of the vessel during the time that it was in the hands of the Government agents.

In the case of *Crocker* v. *United States,* 240 U. S. 74, 81, this Court held that although no recovery could be had upon a contract with the Postmaster General because

it was tainted with fraud and rescinded by him on that ground, nevertheless the claimant was entitled to a recovery upon *quantum valebat.*

It is apparent that under the decisions of this Court, even if the administrative officer of the Army Transport Service were without authority to order this adjustment of general average, (which petitioner denies) the petitioner is entitled to recover its fair value upon implied contract for *quantum meruit* and that the judgment of the Court of Claims in holding to the contrary is in conflict therewith.

CONCLUSION.

The opinion of the Court of Claims places in the reports a doctrine at complete variance with established maritime law and the decisions of this Court.

Review by certiorari should be had with a view to reaffirming the holdings of this Court unheeded by the decision below.

Respectfully submitted,

CLETUS KEATING,
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